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Ontario Municipal Board

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PL101300

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant: 2051205 Ontario Inc.
Appellant: 456941 Ontario Ltd., 1263339 Ontario Ltd.,
Lea Silvestri, Lea Silvestri Investments
Limited ("Silvestri Investments")
Appellant: 909940 Ontario Inc. and Lynmount
Developments Ltd.
Appellant: Alex Milojevich; and others
Subject: ROPA 41
Municipality: City of Hamilton
OMB Case No.: PL101300
OMB File No.: PL101300

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant: 2051205 Ontario Inc.
Appellant: 456941 Ontario Ltd., 1263339 Ontario Ltd.,
Lea Silvestri, Lea Silvestri Investments
Limited ("Silvestri Investments")
Appellant: 909940 Ontario Inc. and Lynmount
Developments Ltd.
Appellant: Alex Milojevich; and others
Subject: OPA 135
Municipality: City of Hamilton
OMB Case No.: PL101300
OMB File No.: PL101301

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant: 2051205 Ontario Inc.
456941 Ontario Ltd., 1263339 Ontario Ltd.,
Lea Silvestri, Lea Silvestri Investments
Limited ("Silvestri Investments")
909940 Ontario Inc. and Lynmount
Developments Ltd.
Environment Hamilton; and others
Subject: OPA 82
Municipality: City of Hamilton

OMB Case No.: PL101300
OMB File No.: PL101302

IN THE MATTER OF subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant: 2051205 Ontario Inc.
Appellant: 456941 Ontario Ltd., 1263339 Ontario Ltd.,
Lea Silvestri, Lea Silvestri Investments Limited
("Silvestri Investments")
Appellant: 909940 Ontario Inc. and Lynmount
Developments Ltd.
Appellant: Alex Milojevich; and others
Subject: By-law No. 10-288
Municipality: City of Hamilton
OMB Case No.: PL101300
OMB File No.: PL101303

APPEARANCES:

Parties

Counsel

City of Hamilton	N. Smith
Environment Hamilton Inc.	E. Gillespie
Hamiltonians for Progressive Development	E. Gillespie
Freeland Developments Limited	F. Sperduti
Wasserman et al.	F. Sperduti
Silvestri Investments	P. Pickfield
Ancaster Christian Reformed Church	P. Tice
Tradeport International Corporation	P. Tice
Elfrida Landowners	J. Drake
20 Road Landowners East	T. Nayler

Craig Smith

DECISION DELIVERED BY J.V. ZUIDEMA AND ORDER OF THE BOARD

ISSUES

[1] This decision pertains to Phase 2 of the above-noted matter. A Phase 1 decision was issued by the Board differently constituted and the reader is directed to that decision concerning background and the settlement achieved for that phase. The issues for Phase 2, as reflected in the Board's Procedural Order were as follows:

- a. How much employment land is required to meet the employment forecast to 2031?
- b. Does the decision on need, and amount of lands required, for the proposed urban boundary expansion within the Airport Employment Growth District Study Area ("AEGD"):
 - i. Conform to the Growth Plan for the Greater Golden Horseshoe (2006);
 - ii. Is it consistent with Provincial Policy Statement (2005);
 - iii. Does it give proper consideration to the former Region of Hamilton-Wentworth, former Town of Ancaster and former Township of Glanbrook Official Plan policies?

[2] It is important to acknowledge that these are the only issues for Phase 2 of this hearing. These issues were crafted by the parties and ultimately codified into a Procedural Order issued by the Board.

[3] Issues for Phase 3 of this hearing, will deal with the following:

- a. Boundary Configuration;
- b. Land Use Designation and Supporting Policies;
- c. Implementation in relation to the Urban and Rural Official Plans; along with,

- d. Conformity to the Growth Plan, consistency with the PPS and appropriate regard/conformity to the relevant former Region of Hamilton-Wentworth, former Town of Ancaster and former Township of Glanbrook Official Plan policies as they pertain to these Phase 3 issues.

[4] Also the parties were clear that Issues for Phase 3 will be reviewed and perhaps fine-tuned following the issuance of this disposition.

[5] I make this distinction clear at the outset of this decision for two reasons: firstly, this Phase is part of the City's exercise associated with the AEGD only and not its larger growth planning exercise. That larger growth plan process is being adjudicated by another Panel of this Board and is ongoing. Secondly, because while the Appellants, Environment Hamilton Inc. and Hamiltonians for Progressive Development ("EH" and "HPD" respectively) were engaged in the process of drafting the specific issues for each phase of the hearing, some of their evidence could be categorized as Phase 3 issues. This is not to say that EH and EPD did not proffer evidence to address the issue of employment land needed. They did. However they also questioned the location of where those employment lands should be directed.

[6] This questioning is troubling given the decision of the Board on Phase 1. That decision was issued June 1, 2012 and arose from a settlement achieved by the parties and the Board, differently constituted states clearly that:

"All the appellants and parties that took a position in Phase 1 of this hearing have executed this agreement... Planner Hickey-Evans testified that the intent of ROPA 25 (approved by Ontario Municipal Board (OMB) Decision No. 3080 in 2006) was to provide for the development of a future employment growth district within an identified study area for this proposed employment growth district.

The parties that signed the agreement have agreed that:

1. There will be no residential land use designations within the AEGD study area;
2. The discussion on residential uses would only be permitted in the context of determining suitability of lands for employment purposes within the proposed AEGD secondary plan area;

3. If the OMB chooses to designate lands for employment uses within the AEGD study area, then the parties will not argue these same lands should be residential in the context of the other OMB hearings respecting the Rural and Urban Official Plans which are under appeal;
4. The determination of retail commercial uses will be argued in subsequent phases of this hearing." (Exhibit 2, Tab 33, p. 937)

[7] It is clear from the Board's wording "lands for employment purposes within the proposed AEGD secondary plan" in paragraph 2 above that the AEGD study area would have employment uses. This conclusion would be in keeping with the history of the process.

[8] If EH and HPD were not in agreement that lands for employment purposes within the proposed AEGD were contemplated, they should have made their position known clearly to the Board and not left any other impression.

EH and HPD Joint Evidence

[9] Another matter I wish to make clear at the outset of this decision is that throughout the evidentiary portion of this phase of the hearing, the evidence proffered by EH and HPD was joined. In other words, at no time was the Board told that specific testimony or evidence was being presented on behalf of EH or HPD separately. Given this approach, I understood that although EH and HPD were separate appellants, they were represented by the same counsel as their issues were one and the same. In this regard, EH and HPD were *ad idem* and were treated as joined parties.

[10] The significance for this distinction will become apparent further in this decision.

BACKGROUND

[11] To address the specific concern of EH and HPD of whether the identification the AEGD Study Area for employment growth was the proper decision, that conclusion had already been determined. The precise task of delineating boundary configuration is an exercise to be left to Phase 3 of this hearing. Despite these facts, during this phase of

the hearing, EH and HPD questioned the appropriateness of the AEGD Study Area for such employment growth.

[12] The unfortunate aspect of that strategy can be captured in the vernacular of "that horse has left the barn." Planning for employment lands began in Hamilton pre-Growth Plan. Back in 2005, it was known as Growth Related Integrated Development Strategy or "GRIDS." The GRIDS process resulted in Special Policy Area 9 of the AEGD Study Area also referenced as Regional Official Plan Amendment #25 ("ROPA 25").

[13] GRIDS concluded in 2006 with a decision by this Board, differently constituted which approved the AEGD Study Area. That decision of November 2006 arose out of a settlement wherein HPD was a signatory through its Counsel, the same Counsel representing it at these proceedings (see Minutes of Settlement Exhibit 2, Tab 24).

[14] The Settlement's genesis arose from the City of Hamilton's ("City") Motion to Dismiss the appeals launched by the Ministry of Municipal Affairs and Housing ("MMAH") and HPD. In the end, the parties agreed to the dismissal of the City's Motion without a full hearing and allowing MMAH's and HPD's appeals in part in order to have the Board approve Amendments to the Region of Hamilton-Wentworth, Town of Ancaster and Township of Glanbrook's Official Plans respectively referenced as ROPA 25, OPA 104 and OPA 50. Those Amendments were attached to the Minutes of Settlement as Appendix 1.

[15] The purpose of the Amendments was to identify a Special Policy Area in which to consider an Airport Employment Growth District centered on the John C. Munro International Airport ("Munro Airport") and to recognize, protect and capitalize on the long-term economic importance of the Airport and its unique role as a catalyst for airport related and other employment uses.

[16] The Amendment was clear that besides protecting the Airport's 24-hour operation, it was to "provide for the development of a future employment land growth centre." It articulated that further "study [was] required to demonstrate such matters as the amount of land required for the Airport Employment Growth District, the nature of the proposed employment uses, the infrastructure (particularly sewage, water and transportation) needed to service the lands, provisions required to maintain the key functions of the airport, including the minimization of land use conflicts related to

existing/planned airport operations, and the cost and method of financing the employment district.”

[17] That further study led to the City undertaking a comprehensive exercise to assess the urban boundary expansion which included significant public engagement. That decision was initiated in October 2010 and resulted in the adoption of a Secondary Plan.

[18] I provide this background simply to underscore that if a dispute concerning the location targeted for employment growth is to be raised, that should have been done at the earlier Board hearing and not this one. HPD cannot in 2006 agree to the particulars of ROPA 25 which established the AEGD Study Area for future employment growth only to later suggest through evidence adduced at this hearing that the AEGD Study Area is not the right location after all.

[19] As established earlier, HPD’s approach joined with EH in this proceeding, does not accord with its position at the 2006 OMB hearing noted above.

[20] The City put the following question to the Board: is Board intervention in the City’s growth management strategy in employment lands warranted? The short answer is no. In coming to this conclusion, I provide further reasons as noted below.

[21] Counsel to HPD and EH stated in his opening statement that the central issue for the Board was to determine how much land is needed and that meant, a thorough review of the land budget exercise. He questioned not only the actual figure used by the City but also suggested that gross figures, not net, should be used. A key criticism by HPD and EH was that the City’s projections for available land to meet employment demand were not accurate and HPD and EH asserted that in fact, more employment land was available.

CONVERSIONS

[22] For example, EH and HPD suggested folly in the City’s actions when it took existing employment land and converted it to other uses. HPD and EH suggested that it was wholly inappropriate for the City to suggest it needed more employment land when it had converted existing employment land.

[23] The conversions in question were the Smart Centre site and the Mady Development site ("Mady"). Mr. Gillespie, through his cross-examination of Antony Lorus, an expert land economist called by the City, raised these two examples. Mr. Lorus was not able to provide details of these conversions so the alleged concern was left unanswered at that point.

[24] So to address these examples, Joanne Hickey-Evans, an expert land use planner, was called by the City. With respect to both sites, she testified that City Council had approved the conversions which resulted in appeals being launched by EH.

[25] On the Smart Centre site, a settlement was reached and on consent of the parties, the official plan amendment and rezoning for that site were approved by the Board differently constituted. In other words, EH, in the end, settled and agreed to the conversion.

[26] On the Mady site, EH withdrew its appeal.

[27] I do not have the benefit of knowing the terms and conditions for this prior settlement or withdrawal. However, the end result is that the two examples of conversions raised by EH and HPD were resolved to the satisfaction of EH in those earlier proceedings. Therefore, I do not agree with EH and HPD's criticism on this specific account.

Growth Management Exercise

[28] So now to address the real issue for this phase of the hearing: did the City fall short in its growth management exercise and the preparation of its land budget? My answer is the same as that for Board intervention and that is "no."

[29] I heard from Ann Joyner on behalf of the City, who was qualified and accepted as an expert in land use planning. She spoke of the AEGD planning process arising from the November 2006 OMB settlement (as referenced earlier). She explained how the study area encompassed the existing urban boundary; how Niagara Escarpment lands were excluded; how core areas were identified and where existing employment areas were located. Ms. Joyner worked in tandem with Mr. Lorus such that her opinions were founded upon the technical research he conducted. She concluded that the requirements of s. 2.2.8 of the Growth Plan had been met. Her evidence was not

shaken in cross-examination. I, therefore, am satisfied that there is conformity with s. 2.2.8 of the Growth Plan.

[30] Ms. Joyner's testimony coupled with that of Ms. Hickey-Evans' established in my mind, that the City underwent a comprehensive process to achieve ROPA 25 or SPA 9 and following the Board's ruling in November 2006, initiated community consultation. EH and HPD were part of the community liaison groups and HPD had input into the language of the policy.

[31] In addition to these background processes, Mr. Lorus, in conducting his own independent assessment and arriving at his own conclusions, undertook a number of steps to determine the forecast of land demand. They included:

- preparing an employment forecast;
- using those results, preparing an employment forecast by type;
- assigning the forecast of employment by type to designated employment areas; and
- applying a density factor to the results.

[32] The starting point for the research is The Growth Plan for the Greater Golden Horseshoe ("Growth Plan"). Schedule 3 sets out the forecast which must be used by the City for planning and managing growth. For the years 2006 – 2031, the forecasted growth is 80,800 as by 2031, the City of Hamilton is expected to have a total of 300,000 jobs.

[33] These figures represent more rapid growth than that experienced by the City in years prior.

[34] In doing the analysis, Mr. Lorus concluded that the employment land employment ("ELE") would have a significant component of total growth over the period to 2031 of 45%. A distinction between ELE and employment area was clarified in that the latter refers to defined geography whereas the former reflects a type of job.

[35] This distinction was necessary given that the other two types of employment, specifically major office employment ("MOE") and population-related employment

(PRE") are fixed. Mr. Lorius explained that ELE growth was critical to the City's overall long-term economic growth.

[36] He summarized his findings by assessing the employment land demand; determining the employment land supply; and calculating the shortfall which entailed. His final figure was a shortfall of 555 net ha or 695 gross ha (using an 80% net to gross ratio) (see revised Exhibit 3, p. 1).

[37] In efforts to scope the evidence, the experts retained by the City, by Twenty Road Landowners Group West ("20 Group"), and EH/HPD met to try to come to some agreement. Exhibit 8, Agreed Statement of Facts was prepared. In the summary chart shown on page 2 of this document, it is clear that Sameer Patel, who was called by 20 Group, qualified and accepted as an expert land economist and Mr. Lorius agreed on four topics identified:

1. The Growth Plan employment forecasts show the City reaching a total employment of 300,000 in 2031. Updated forecasts show higher figures for 2031 and 2041.
2. The method for determining employment area land demand shown in the Witness Statement of Mr. Lorius is appropriate.
3. Growth Plan density target is a blended residential and employment density that applies to the entire designated greenfield area within the City.
4. The source of the land supply information should be the City of Hamilton.

[38] Gary Davidson, called by EH/HPD agreed with item #1 only. Although Dr. Davidson was asked to be recognized as an expert land economist, the Board heard objections from parties opposite to his qualifications. They suggested that he was more properly categorized as a land use Planner and did not have the special qualification or knowledge to be recognized as an expert in land use economics or land budgeting.

[39] The Board asked Mr. Davidson if he had been qualified and accepted as an expert land economist in any other proceeding and he cited an OMB hearing in Manotick, near the City of Ottawa. That turned out to be the Minto decision and I

requested a copy of the decision in order to come to a conclusion with respect to Mr. Davidson's qualifications.

Oral Ruling

[40] I provided the following oral ruling substantially as depicted below:

- a. Dr. Davidson is recognized as a land use Planner. I am not satisfied that he has "acquired the special or peculiar knowledge through study or experience" to attach a distinction of expertise in economic development or land budgeting to his area of expertise, namely planning.
- b. My reasons are as follows:
 - i. Dr. Davidson has no professional affiliations similar to that of Messrs. Lorus and Patel with the Association of Ontario Land Economists;
 - ii. In his numerous consulting projects spanning the last 10 years, nowhere is there a reference to land budgeting, economic development or land use economics in the interpretation being provided to this Board today. There are 13 references to workshops, training courses, and publications connected with climate change. If land budgeting, economic development or land use economics was an area of "special or peculiar knowledge" one would have thought it would have appeared at least once in this list.
 - iii. When pointedly asked if he had been accepted as an expert previously by another court or tribunal in the area of land use planning with an expertise in economic development or land budgeting, he cited the Minto decision. The Board in that decision does not reflect Dr. Davidson with that additional specialty. He was accepted as a land use Planner. The Board in that case did identify other experts with specializations such as Robert Clark, land use Planner with a specialty in rural planning; David Douglas, land use planning with a specialty in community planning. Dr. Davidson was not reflected with any particular specialty contrary to his evidence given to me.

- iv. With respect to the Fort Erie decision, the Board excluded the witness based on a lack of independence and not a lack of expertise. The case is instructive in that Vice Chair Schiller set out two criteria which she felt were important to consider. The section 43 Review (presented by Mr. Gillespie) deals with the exclusion of the witness but presumably on the basis of lack of independence and not expertise.
 - v. Mr. Gillespie suggests to me that my decision could have a dire ripple effect to all in-house municipal planners across the province. I disagree. My decision stands for the proposition that in order to be afforded a higher distinction than that of one's discipline, a witness must demonstrate a specialized area of knowledge through either study or experience. It does not mean that qualified planners are not permitted to express their opinions on all matters associated with planning.
- c. Therefore the Board recognizes Dr. Davidson as an expert witness qualified to provide opinion evidence in the area of land use planning. He may wish to provide commentary on matters of economic development or land budgeting. That part of his evidence will be afforded appropriate consideration and weight in accordance with this ruling.

[41] Given this determination, I prefer the evidence of Messrs. Lorus and Patel on matters of land budgeting and economic development and as such, afforded it greater weight. Nevertheless, this decision does address those criticisms raised by Dr. Davidson against the data and opinions produced by Messrs. Lorus and Patel.

Density Targets

[42] Dr. Davidson's key criticism was that the minimum density target of 50 jobs per ha was not being met. He cited s. 2.2.7.2 of the Growth Plan as the basis for this figure. He suggested such a failure given that the AEGD achieves a maximum of only 30 jobs per ha. (see Exhibit 5, Tab 2 p. 5) The problem with this interpretation is that Dr. Davidson suggests the 50 jobs per ha applies to the AEGD singularly whereas the policy clearly states that the density target "will be measured over the entire designated

greenfield area of each upper – or single –tier municipality.” (see s. 2.2.7.3 of the Growth Plan) The policy then goes on to specify certain features to be excluded.

[43] The term “designated greenfield area” is defined: the “area within a settlement area that is not a built-up area. Where a settlement area does not have a built boundary, the entire settlement area is considered designated greenfield area.” Settlement area is also defined as is built-up areas.

[44] Settlement areas means “urban and rural settlement areas within municipalities (such as cities, town, villages and hamlets) where a) development is concentrated and which have mix of land uses; and b) lands have been designated in any official plan for development over the long term planning horizon provided for in the Provincial Policy Statement, 2005. Where there are no lands that have been designated over the long-term, the settlement area may be no larger than the area where development is concentrated.” (see definitions section of Growth Plan)

[45] Similarly built-up area means all lands within the built boundary or within the “limits of the developed urban area as defined by the Minister of Infrastructure in accordance with Policy 2.2.3.5.”

[46] To suggest that the application of the density target is to a specific area without addressing the requirement that the target applies to the entire designated greenfield area is a serious flaw. This is one of the reasons why I do not place considerable weight to Dr. Davidson’s evidence.

[47] Another serious flaw is that the density target is a blended number comprising of residents and jobs – not just jobs. Throughout his testimony, Dr. Davidson centered on the density as 50 jobs/ha. So Dr. Davidson’s starting point is simply incorrect and hence, another reason why his evidence is not preferred.

[48] Mr. Lorus’ data however, did address the density target as a blended target measured over the entire designated greenfield area in accordance with the policy.

Existing Employment Lands

[49] This brings me to the second area of criticism borne out through Dr. Davidson’s evidence and that is the City has not properly taken into account the existing

employment lands to address the shortfall. The issue of alleged improper conversions has already been addressed earlier in this decision. The concern was with the other existing industrial lands and to prove the point, Exhibit 9 was proffered.

[50] Exhibit 9 was a compilation of assessment data prepared by the Hamilton Civic League. The document had 37 pages with space for 45 entries on each page. Simple multiplication suggests that there could have been as many as 1665 entries. However, not all of the pages were complete and there could have been duplicates. Thankfully the Board was not taken to each entry based on assessment roll number but suffice it to say, a conservative estimate would be that there were more than a thousand entries.

[51] It was this information upon which EH/HPD based its position that there was existing and available land to be used for employment purposes. Dr. Davidson suggested that approximately 120 ha would be available and was missed by the AEGD study; he referenced this assessment material. Dr. Davidson did not review Exhibit 9 in detail to identify the specific properties which were missed that totalled roughly 120 ha. He provided that figure, it seems, as a ball-park number.

[52] The policy directive in both the Growth Plan and the 2005 PPS requiring municipalities across the Greater Golden Horseshoe to intensify is not disputed. That policy remains and must be followed where possible. In abiding by that policy however, a balance of competing interests and directives must be assessed and determined.

[53] Nevertheless, with respect, this assessment data of Exhibit 9 is just that: data to be used for assessment purposes and not long-range land use planning. In Mr. Lorus' evidence, he did review the possibility of existing parcels of available land which could be used for employment purposes. There were parcels but in some instances, they were not of a sufficient size to be feasible. In other instances, existing parcels had serious environmental issues which required remediation or had constraints such as limited access. In other words, Mr. Lorus, in his analysis, did address the take-outs in order to come to his recommendation of 555 net ha. The analysis is a requirement of the Growth Plan policy and it has been met. All of these factors play into the decision-making process of any large employer when selecting a location for its business. These are realities which cannot be ignored.

[54] To state “there is a considerable supply of potential sites within the exiting [sic] settlement area that have to be considered before a definitive need can be established for additional lands outside the existing settlement area” and to suggest a figure of approximately 120 ha (or 400 acres as noted in Dr. Davidson’s witness statement at paragraphs 13 and 14) without addressing the specifics, namely location and potential constraints, is neither helpful nor persuasive.

Expansion into Agricultural Area

[55] Another criticism in Dr. Davidson’s review was that an expansion into an agricultural area would occur. He states that both “the Growth Plan (s. 2.2.8 (f)) and the PPS (s. 1.1.3.9) have policies regarding settlement expansion into agricultural areas. His evidence was that the majority of the proposed AEGD expansion area is designated for agriculture and agricultural operations in the Rural Hamilton Plan.” (see witness statement para. 22).

[56] Through cross-examination by Ms. Smith for the City, Dr. Davidson said he thought the Hamilton Rural Plan was still under appeal and he was not aware that all the appeals had been resolved on or about March 20, 2012. Exhibit 3 included Schedule D of the Hamilton Rural Official Plan (see pgs. 16 and 23).

[57] When one examines the Schedule and the designations, it is patently obvious that aside from Munro Airport itself, the majority of the AEGD Secondary Plan Boundary is in fact Rural, and not Agriculture. That is not to say that there is no Agricultural designation – a portion does exist at the most southern point of the Secondary Plan Boundary on the south side of Highway 6 adjacent to White Church Road. That portion in no way compares to the amount that is identified and designated Rural.

[58] Therefore this point of criticism is not borne out by the evidence.

EH/HPD’s Land Demand Figure

[59] But to address the first issue identified for this phase of the hearing, it was during his cross-examination by Counsel to the City that Dr. Davidson arrived at a figure for the amount of employment land needed: 313 ha. He arrived at that number by working backwards from Messrs. Lorus’ and Patel’s figure.

[60] Dr. Davidson came up with this figure within a few minutes while under cross-examination and without any reference to it in his witness statement. By accepting Messrs. Lorius' and Patel's figures as a starting point, it is clear to me that Dr. Davidson must have accepted, at least to some extent, the legitimacy of their methodology. If their figure was completely unacceptable, one would have thought it would not play into any calculation whatsoever.

[61] The fact that Dr. Davidson could pull a number of 313 ha while doing the mathematics on the stand does not lend credibility to his evidence. Unlike Mr. Lorius, Dr. Davidson provided no satisfactory explanation of his land budgeting process or the specific factors which went into that process. To do this calculation "on the fly" seriously undermines the value of his evidence.

[62] In any event, at the end of the day, the City and EH/HPD are therefore *ad idem* in that their respective witnesses agree that a certain amount of employment land is needed. Their figures differ and EH/HPD contends that the amount can be accommodated within existing industrial areas in the City.

[63] Because of the paucity of detailed, reliable evidence to support Dr. Davidson's statements concerning the existence of available industrial land to accommodate the employment land demand, and the skewed interpretation of the density target to apply to the AEGD without appreciating its blended application over the entire designated greenfield area as defined, I discount Dr. Davidson's evidence and prefer that of Messrs. Lorius and Patel on matters of land budgeting and land use economics.

[64] In that regard, to answer the question posed in Issue 1, the Board determines it to be 555 net ha.

Aviation Statistics and Analysis:

[65] Now I come to the evidence of Richard Gilbert. In opening submissions, Mr. Gillespie categorized this witness as a Transportation Consultant. After some back and forth between the parties, the scope of Dr. Gilbert's expertise was narrowed to that of "aviation statistics and analysis." Therefore the Board accepted him as an expert only in that area.

[66] The purpose of Dr. Gilbert's testimony and evidence was perhaps to call into question the suitability of the AEGD and the Secondary Plan to accommodate the project employment need forecast. The thrust of his testimony was that unlike many other airports across the country, passenger activity at Munro Airport had been falling. In Dr. Gilbert's opinion, if that decline continued which he suspected would be the case, there would be no passenger activity at this airport.

[67] With respect to cargo activity, Dr. Gilbert testified that although that business had been relatively steady over the last 10 years at Munro Airport, that type of activity would undoubtedly be impacted by rising fuel prices and other escalating costs.

[68] Given his narrow area of expertise in aviation statistics and analysis, I took no opinion on the planning matters enunciated in Issue 2 for this phase of the hearing: whether the projected need conforms to the Growth Plan, is consistent with the 2005 PPS and has proper regard to Official Plan policies.

[69] In cross-examination by Mr. Tice, Dr. Gilbert admitted that in preparing his work, he had not spoken with anyone at Munro Airport or any other Airport or any other Airline or Air Consulting firm. He had obtained his information from Statistics Canada ("Stats Can") as well as the City Staff Reports, the Airport Market Analysis and Land Needs Study of 2009, the Hamilton International Airport 2010 Master Plan Update, the 2004 Master Plan Update, Munro Airport's own Annual Reports and various websites (i.e. the U.S. Federal Aviation Administration website for data on Buffalo Airport).

[70] In his comparison to the performance at other Canadian airports, Dr. Gilbert chose Kelowna, Moncton and Thunder Bay to make the point that Munro Airport was experiencing a decline in passenger movement whereas the other three airports had seen a modest but steady increase. This, he said was true for the Toronto Airports (Billy Bishop and Pearson combined) and Buffalo.

[71] However, in selecting the three Canadian comparators, he could not explain the impact that Toronto's Pearson Airport ("Pearson") would have. To put it bluntly, Munro Airport has Pearson to contend with which is less than 100 km away. Pearson is likely one of, if not the busiest airport in the country. None of the other three comparators had such a factor.

[72] Frank Scremin was called to address the evidence of Dr. Gilbert. Mr. Scremin is the President and CEO of Tradeport, the company that runs Munro Airport. Although Mr. Scremin is an engineer and holds an MBA, he was not presented as an expert witness.

[73] Mr. Scremin methodically reviewed the investments which Tradeport had made in the last number of years along with the investments by other companies which use and rely on the airport. They include Purolater, West Jet, Cargo Jet and Kelowna Flight Craft. Mr. Scremin pointed out that Munro Airport has one of the largest truck to aircraft and vice versa cargo movement in the country.

[74] Munro Airport represents the eastern Canadian hub for Purolater, the southwestern Ontario hub for UPS, and a distribution centre for DHL and Loomis which does DHL's domestic runs. The only major courier that is not at Munro Airport is FedEx.

[75] Mr. Scremin also explained the fluctuations experienced at Munro Airport over the last decade: 2003 saw Air Canada declare bankruptcy and WestJet move some of its operations to Pearson. This was primarily due to the decline in airline activity post the terror attacks of 9-11 which resulted in some slots opening up at Pearson.

[76] While there were increases in passenger activity with CanJet and Flight Globespan which ran charter services to the United Kingdom in 2006 – 2007, the recession of 2008 caused an economic downturn. In that same year, Air Canada moved its flights to Ottawa back to Pearson. By 2010, Globespan went out of business and WestJet changed its operations which resulted in decreased levels of passenger activity.

[77] However, in 2011 and 2012, Air Transat broadened its services to more southern destinations and according to Mr. Scremin, just adding one more daily domestic flight can result in an increase of 70,000 passengers annually. In other words, a small change can have significant consequences.

[78] However, he described that the cargo services were integral to Munro Airport's business. Munro Airport uses Maximum Take Off Weight ("MTOW") as a basis for its landing fees and the fees are based on each 1000 kilograms. The reason for this methodology is that it can result in carriers using wide-body airplanes which are more

fuel efficient, require less staff to operate and carry more products. As such, the Airport does not report movement data but rather volume statistics to Stats Can.

[79] The obvious conclusion is of course that even though there may be fewer cargo flights, the flights are still profitable given that a larger volume of product is being transported. To focus one's analysis simply on the number of flights does not take into account the particulars of the activity and the larger operations at the airport.

[80] I do not accept Dr. Gilbert's forecast that Munro Airport will slowly decline to the point of no passenger activity and cargo activity will also decline due to rising fuel and operation costs. I prefer Mr. Scremin's evidence given that he is much more intimately familiar with the details and operations of this specific Airport.

Participants

[81] The Board also heard from a number of Participants: Rick Zingel, John Bacher, David Hart Dyke, Jim Sweetman, God McNulty, Larry Pomerantz, Julie Brezden, Kris Robinson, Virginia Cameron, Rita Masi through her grand-daughter Emery Masi, Cindy Mayor, David McLaughlin, Malcolm Clark, Kathie Clark, Chris Pearson, Barbara Baldwin, Jeremy Parson, Bill Simone and Peter O'Hagan.

[82] All of these individuals testified as lay-persons. I will not recite details of their evidence but summarize to say that they raised concerns that detrimental environmental impacts would occur as well as a loss of agricultural land and sufficient industrial existing land was available and should be utilized before any expansion occurs.

[83] In each case, I have no reason to question that the concerns held by each Participant were legitimate and genuine to him or her. While that may be the case, those apprehensions are not sufficient to successfully undermine the testimony presented by the experts.

Planning Evidence

[84] The Board also heard from Linda Lukasik. She was called by EH/HPD as an expert in land use planning. While initially the Board was told that there would be a challenge to Ms. Lukasik's evidence based on lack of independence, that challenge was

not pursued and submissions were made on the appropriate weight to be afforded to her.

[85] The reason for this concern was because Ms. Lukasik is the Executive Director of EH, a party to the proceeding. Because she is in the employ of EH, it was suggested that she is required to take direction and instruction from EH's Board of Directors, and that included formulating her planning opinion. Ms. Lukasik was qualified and accepted as an expert in land use planning.

[86] I do not diminish Ms. Lukasik's evidence simply by virtue that she is in the employ of EH. As a Member of the Ontario Professional Planners Institute ("OPPI"), she, like all Planners, has a professional obligation to present her independent opinions outside of the interests of their employer.

[87] In-house Planners at municipalities, at the province, and with numerous agencies are routinely required to prepare and offer their professional opinions. Sometimes those opinions support the approach of their political masters; sometimes they do not. In any event, the role of a professional is to provide his or her best professional independent opinion and analysis so that any decision-maker, whether it is municipal council, a provincial ministry or agency, or this Board, can have the benefit of that information to arrive at an informed decision.

[88] Further, her testimony was on behalf of both EH and HPD as at no time was a distinction made that she was not providing opinion evidence on behalf of both parties.

[89] A key criticism in Ms. Lukasik's evidence was that the AEGD option was always included in the City's GRIDS process and as such, a thorough and more comprehensive review was not undertaken. She cited the Nine Directions endorsed by City Council (see Exhibit 7, Tab 6, p. 12) and testified that the Aerotropolis site, now referenced as AEGD in this hearing, failed 7 of the 9 directions.

[90] To support her concern, Ms. Lukasik took the Board to the Final Growth Options Report of February 2005 prepared by Dillon Consulting which stated: "... Council has approved the designation of 285 ha of employment lands plus an additional 400 – 800 ha associated with the airport. This already identifies the aerotropolis cluster as key to the economic future of the City of Hamilton." (see Exhibit 7, Tab 9, p.10) For completeness, a footnote was added to this section: "The employment land needs are

included in Table A to understand the total land needs for each of the growth options. For the purpose of this exercise, it was assumed that all new employment lands are outside the current urban boundary." (*ibid.*)

[91] She states unequivocally that the "municipality's decision to proceed with this growth option, despite the failure of this option to meet the Nine Directions for Development, constitutes a failure to uphold the sustainable development planning policies set out and committed to in the City's Building a Strong Foundation and Vision 2020 Sustainability Plan. The City's Nine Directions for Development set out sustainability criteria that underscore the reasons why the airport area, from a sustainability point of view, is not feasible as a location for employment lands development." (see Exhibit 7, Tab 2, p. 5)

[92] It because of these reasons in part that Ms. Lukasik concludes that "the proposed urban boundary expansion does not conform with the sustainability and other provisions set out in the municipality's various planning policy documents and its current Official Plan." (see Exhibit 7, Tab 2, p. 7)

[93] During cross-examination Ms. Lukasik indicated that she did not disagree with Ms. Hickey-Evans' account with respect to the history of the GRIDS process. She acknowledged that the Nine Directions were inputs for creating development options for the GRIDS process and GRIDS itself was not a planning instrument. GRIDS resulted in the formation of ROPA 25, which was approved by the Board in 2006 and nowhere in ROPA 25 was there a requirement to look outside the Special Policy Area (SPA 9) to accommodate employment growth.

[94] HPD was an active party at the OMB hearing where ROPA 25 was approved, and the approval was as a result of a settlement achieved between the parties. If ROPA 25 was incorrect due to such a serious omission or was drafted poorly such that clearer language was needed to avoid misinterpretation, why did HPD agree to have the Board approve it in the form it was back then? Ms. Lukasik could not provide a satisfactory answer.

[95] The purpose of ROPA 25 states clearly that it "is to identify a Special Policy Area in which to consider an Airport Employment Growth District centered around the John C. Munro International Airport. ... The effect of the Amendment is to protect John C.

Munro International Airport's 24 hour operation by restricting incompatible and noise sensitive land uses from encroachment into Airport noise sensitive area; and to provide for the development of a future employment land growth centre." (see Exhibit 2, Tab 24 p. 856)

[96] On a plain reading of this policy, the development of a future employment land growth centre would be around the airport. In her testimony, Ms. Lukasik did not identify specifically any other location for employment uses. She, like Dr. Davidson, raised the assertion that there were existing vacant industrial lands and that was borne out by the assessment data depicted in Exhibit 9. However, neither witness methodically reviewed Exhibit 9 to i) identify the specific parcels of available vacant industrial land and ii) explain how those parcels would be suitable for employment uses.

[97] Ms. Lukasik's raising the alleged deficiency in the City's approach and suggesting that more study is required are not sufficient. To support their positions, EH/HPD should have shown exactly where and how the forecasted demand for employment land could have been accommodated within the existing urban boundary. They did not and as such, I cannot decide in their favour.

[98] Another area of concern raised by Ms. Lukasik was her allegation that the public was never properly informed of the method by which the land need was being calculated and that the "dialogue between levels of government regarding the proposed size of the AEGD has largely taken place behind closed doors." (see Exhibit 7, Tab 2, p. 4 para. 18)

[99] The levels of government which Ms. Lukasik was primarily referencing were MMAH and the City. MMAH was not present at the hearing but correspondence from them had been submitted within the document books.

[100] During her cross-examination, Ms. Lukasik did not dispute that the correspondence between the City and MMAH could be found on the City's website and she admitted that they were in the public realm. She confirmed that she had been in attendance and in fact, spoke at a Committee of the Whole Meeting on June 23, 2008 when such correspondence was addressed.

[101] Accusations of dialogue "behind closed doors" are taken seriously. In today's environment, every effort is made to ensure transparency and accountability at all levels

of decision-making. To raise such an allegation when the facts do not support it utterly undermines the credibility of this witness.

[102] I prefer the planning opinions of Ms. Joyner to that of Ms. Lukasik or Dr. Davidson in relation to whether the decision on need conforms and is consistent with, as the case may be, to the relevant provincial policy and has proper regard for the local and regional official plan policies.

[103] As noted previously, I conclude that Dr. Davidson's position on the requirement for 50 jobs per ha on an area specific basis does not take into account the density target's combined application across the entire designated greenfield area, and that causes me some scepticism in accepting his opinions.

[104] Ms. Lukasik's opinions on the Growth Plan and the 2005 PPS focussed on how the identification of the AEGD lands failed to meet the policies, not the decision on need, which is the task at hand. I am satisfied that the process followed by the City, which was extensive and spanned years, as well as the methodology used by Mr. Lorius were reliable. The City's process, which included numerous public information centres, workshops and meetings and involved the community at large, including EH, provided information and received input.

[105] The land budget approach used by Mr. Lorius along with his results, were conveyed and explained throughout the public process. Ms. Joyner explained how the provincial policies were met. Specifically Ms. Joyner described how the need for employment land reflected provincial forecasting and the time-horizon of 20 years without exceeding it (s. 2.2.8 (2 (b)) of the Growth Plan). She also testified that by not over-stating the amount of employment land needed, existing employment areas would be protected.

[106] Finally she explained that the density figure for the AEGD lands, namely 37 jobs/ha would contribute to the City achieving the Growth Plan target of 50 residents/jobs combined per hectare. Her approach to the 50 residents/jobs per ha as required by the Growth Plan policy takes into account the application of that density factor across the entire designated greenfield area. I accept her opinion on this account which differs remarkably from the approach taken by Dr. Davidson. Ms. Lukasik made

no reference and provided no opinion either in her testimony or in her witness statement with respect to the Growth Plan density target.

DISPOSITION

[107] Therefore, based on the foregoing reasons, I determine that with respect to this phase of the hearing, the appeals of EH and HPD are dismissed. I accept the evidence presented by the City to conclude that 555 net ha of employment land is needed.

[108] Phase 3 of this hearing can proceed to determine the issues as identified in the Board's earlier Procedural Order.

ORDER

[109] The Board orders that the appeals of EH and HPD on Phase 2 are dismissed and that 555 net ha is required to meet the forecasted demand for employment land to the year 2031.

"J.V. Zuidema"

J.V. ZUIDEMA
VICE CHAIR